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December 4, 2000

EX PARTE OR LATE FILED

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Re: **Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC Seek a Waiver of the Definition of "Study Area" in Part 36 and a Waiver of Various of the Commission's Rules, DA 00-1824, CC Docket No. 96-45**

Dear Ms. Salas:

By this letter, Mescalero Apache Telecom, Inc. ("Mescalero") supplements the record in the above-referenced matter. Specifically, this letter provides requested additional support for Mescalero's request for a waiver of Section 54.305 of the Federal Communications Commission's ("FCC" or "Commission") rules. As part of its government-to-government consultation on the pending petition, Commission staff indicated their concern that additional information specific to Mescalero's circumstances should be provided in support of a grant of the requested waiver.

As an initial matter, Mescalero wishes to reiterate that under the Federal Trust Doctrine (the "Trust Doctrine"), the Commission has certain obligations to work with the Mescalero Apache Tribe with the goal of advancing and protecting the interests of the Tribe.¹ This doctrine not only creates obligations on the part of the Commission, but also empowers the Commission

¹ See e.g., *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) ("[The U.S. government's] conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.")

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to take action when necessary.² Thus, the Trust Doctrine, particularly when combined with the Commission's general authority under Section 1.3 of its rules to waive regulations when such waiver serves the public interest, provides the FCC with the necessary justification to waive rules as they relate to Indian tribes even when FCC precedent might not directly support such waivers in a non-tribal context.

The Commission must consider and apply the Trust Doctrine when making any decisions that may impact Indian tribes. The Trust Doctrine provides support for the requested waiver that goes beyond the Commission's general duty to serve the public interest.³ Even absent the Trust Doctrine, however, the specific circumstances of the Mescalero request warrant a grant of waiver of Section 54.305 of the Commission's Rules.

Section 54.305 provides that carriers purchasing high cost exchanges receive the same level of support per line as the seller received prior to the sale.⁴ Mescalero agrees with the members of the Rural Task Force ("RTF"), that this section severely "limits the ability and motivation of the acquiring entity to make new investments to upgrade the networks in these acquired properties in spite of their high cost and rural nature."⁵ Indeed, as discussed below, in Mescalero's case, Section 54.305 virtually eliminates Mescalero's ability to expand services to the unserved portions of the reservation.

The telecommunications challenges that Mescalero must address in its start-up phase are significant. The Mescalero Apache Tribe has a total population of approximately 4,000 people. The telephone "exchange" that Mescalero has agreed to purchase consists of approximately 950 access lines serving only 42 percent of the population of the Mescalero Apache Reservation.⁶

² The Trust Doctrine has been invoked, for example, to compel the federal government to file suit to protect tribal rights. See e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

³ Grant of the requested waiver also is consistent with President Clinton's recent pronouncement on consultation and coordination with Indian tribal governments. See *Consultation and Coordination With Indian Tribal Governments*, Executive Order 13175 (November 6, 2000) ("Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level . . .").

⁴ 47 C.F.R. § 54.305.

⁵ *Federal-State Joint Board on Universal Service*, Rural Task Force Recommendation to the Federal State Joint Board on Universal Service, CC Docket No. 96-45 at 29 (rel. Sept. 29, 2000) ("RTF Recommendation").

⁶ Benton Foundation, *Native Networking: Telecommunications and Information Technology in Indian Country*, at 11 (1999). Although the figures in this table are based upon 1990 census

The service area covered by these access lines constitutes 51,840 acres of the total 463,000 comprising the Reservation, or, only 11 percent of the total land base of the Reservation.⁷ In addition, the existing facilities have reached capacity and cannot be expanded to serve the currently unserved areas of the Reservation without first upgrading the system. Although GTE previously was asked by the tribe to improve the telecommunications services on the Reservation, GTE had not been able to make such improvements because the necessary upgrades were deemed too expensive.

A current count of residents and business on the Reservation indicates that there are 1,046 businesses and residences. Twenty-one (21) of these establishments are business or critical tribal governmental operations such as the tribal offices, Indian Health Services and the Mescalero Schools. There Reservation has 1,025 residences, 537 (52 percent) of which are without telephone service. Of the 950 access lines on the reservation and reservation controlled lands, including Ski Apache, 569 lines are residential and 356 are business and or tribal government lines and another 26 are payphones. 80 residences have multiple-lines.

The costs of providing service to the residents of the Reservation are much higher than the costs of serving other subscribers in New Mexico and, indeed, are much higher than for most subscribers in any other state. Mescalero's study area cost per loop, at \$2,138, far exceeds the costs per loop of other New Mexico carriers, rural local exchange companies (\$741 and \$561 average cost per loop, respectively) and most other carriers in the United States. In fact, Mescalero's cost per loop is more than eight times the national average cost of \$251.84 per loop. For universal service calculation purposes, based upon currently available data, only six cost carriers in the United States have USF study area cost per loop figures higher than Mescalero. The attached tables provide a detailed comparison between Mescalero's costs of providing service and those of various other categories of cost carriers in the United States.⁸ The substantially higher costs incurred by Mescalero as indicated on the tables clearly demonstrate the unique circumstances confronting Mescalero in its effort to provide vital telecommunications services to the underserved and unserved residents of the Mescalero Apache Reservation.

Mescalero has been established to address the severe shortage of telecommunications services on the Reservation. Because, as a Mescalero Apache governmental operation, Mescalero will be serving its friends and relatives, failure to serve all tribal residences simply is not an option. Mescalero, therefore, hereby assures the Commission that it is committed to the

data, current circumstances on the Mescalero Apache Reservation remain virtually identical to the circumstances present during the 1990 census.

⁷ Attached hereto is a map of the Reservation that indicates clearly (in green) the served areas of the Reservation.

⁸ Also attached hereto, as requested by Commission staff, is a chart showing estimated long term support ("LTS") figures. Because LTS is based upon actual traffic, these figures are, of course, rough estimates only.

provision of services to all unserved residences in the first two years of its operation. This service buildout has been included in the company's projections in support of the \$11.4 million Rural Utilities Service loan available to Mescalero upon obtaining the requested waivers. Service to currently unserved areas of the reservation are planned to be provided as follows.

First Year Projects: Mescalero estimates expenditures of \$6.045 million to provide service to 248 unserved residences. These expenditures will bring services to the communities of Pena. Snow Springs, A&B Hill, Old Ladies Town, Summit, White Mountain Subdivision, New Mescalero School, Old Road, Gallarito Flats, Mud Canyon, Pigeon Tank.

Second Year Projects: Mescalero estimates expenditures of \$5.520 million to provide service to 289 unserved residences. These expenditures will bring services to the communities of Mescalero Village and Highway 70, Cow Camp, White Tail, Silver Lakes, and Three Rivers.

In the *RTF Recommendation*, the RTF correctly suggested that when considering universal service support for acquired or transferred exchanges:

Customers in high cost rural exchanges involved in sale/transfer transactions *should not be "doomed" to poor service* because they live in exchanges that have been involved in sale/transfer transactions where the previous owner had limited access to universal service support funds.⁹

This statement of principle describes the situation on the Mescalero Apache Reservation. In fact, the circumstances faced by Mescalero are even more severe than those faced by a typical carrier providing service in a high cost rural exchange. Because of the antiquated facilities on the reservation, as well as the extremely rugged, and thus, high cost nature of the reservation in general, the effect of Section 54.305 would be to doom 52 percent of the reservation not just to "poor service," but to no service whatsoever.¹⁰ Without a waiver of the per line limit, Mescalero will not economically be able to upgrade the existing facilities sufficiently to support the necessary expansion of service. Put simply, Mescalero would be hampered by the same economic and business realities that have prevented GTE from expanding service in the same manner as Mescalero currently is proposing.

The Commission may waive its rules in those instances when the "particular facts make strict compliance inconsistent with the public interest."¹¹ The Commission's rules must, of

⁹ *RTF Recommendation* at 29 (*emphasis added*).

¹⁰ Because the majority of the reservation also does not have adequate wireless coverage, mobile services cannot be used to fill the gap in basic service.

¹¹ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Time Warner Telecom Inc. Petition for Waiver*, Order, DA 00-2430, CC Docket No. 94-129 (CCB 2000).

course, be presumed valid and Mescalero acknowledges the general proposition that “[a] mere transfer of ownership should not result in an increase in support associated with the acquired lines.”¹² However, in special circumstances, such as those described above, where vast regions of a reservation, as well as large segments of its population, will go entirely unserved if the per line cap contained in Section 54.305 of the Commission’s rules is applied, the public interest is served by a waiver of that rule.¹³

A waiver of Section 54.305 not only will serve the public interest, but it also will advance the principle set forth by Congress in Section 254(b)(3) of the Communications Act of 1934, as amended, that:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are reasonably comparable to rates charged for similar services in urban areas.

Mescalero urges the Commission to recognize the company’s unique needs associated with serving nearly 500,000 acres of very high cost, unserved and underserved Indian lands and to grant the requested waiver. The Mescalero Apache people must be given every opportunity to participate in the information revolution, and the FCC must “ensure, through its regulations and policy initiatives . . . that Indian Tribes have adequate access to telecommunications services.”¹⁴

¹² *RTF Recommendation* at 29.

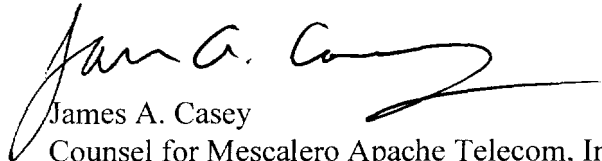
¹³ Waiver of the Commission’s rules is appropriate when “special circumstances warrant a deviation from the general rule.” *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹⁴ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207, at 4 (rel. June 23, 2000).

Magalie Roman Salas
December 4, 2000
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Pursuant to Section 1.1206 of the Commission's rules, two copies of this filing are being submitted to the Office of the Secretary for inclusion in the public record.

Respectfully Submitted,


James A. Casey
Counsel for Mescalero Apache Telecom, Inc.

cc: Chairman William Kennard
Anna Marie Gomez
Katherine Schroder
Gene Fullano
Sharon Webber
Paul Garnett
Geoffrey C. Blackwell

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Mescalero Apache Telecom
Long Term Support Estimate

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<u>Line</u>	<u>Source</u>			
1		<u>LTS Formula:</u>	2001	2002
2 L24		CL REVENUE REQUIREMENT	687,978	838,052
3 L42		Less CCL Revenue	(41,688)	(42,634)
4 L14		Less SLC Revenue	(59,880)	(62,880)
5 L54		Less Special Access Surcharge	(11,400)	(12,000)
6				
7	Sum L2-L5	ANNUAL LTS SUPPORT - ESTIMATED	575,010	720,538
8				

Mescalero Apache Telecom
Cost Per Loop Comparisons - All Companies

	Mescalero	Rural LECs	New Mexico Companies	US West (New Mexico)
USF Study Area Cost Per Loop	2138	561	741	337
PLANT INVESTMENT - COST PER LOOP				
General Support Facilities	2033	339	352	323
Cable & Wire Facilities	5142	1473	1180	1002
COE Transmission	1242	378	502	487
COE Switching	966	482	440	386
Total Plant in Service	9383	2671	2474	2198
EXPENSES - COST PER LOOP				
General Support Facilities	260	31	24	18
Central Office Equipment	320	38	28	24
Cable & Wire Facilities	809	55	45	43
Other Property, Plant & Equipment	0	40	42	42
General and Administrative	321	112	89	80
Total Expenses	1709	277	228	208
RATIOS				
C&WF Cat 1/Total C&WF	86.57%	87.25%	90.35%	93.42%
COE Cat 4.13/Total COE	49.07%	26.97%	33.60%	37.92%

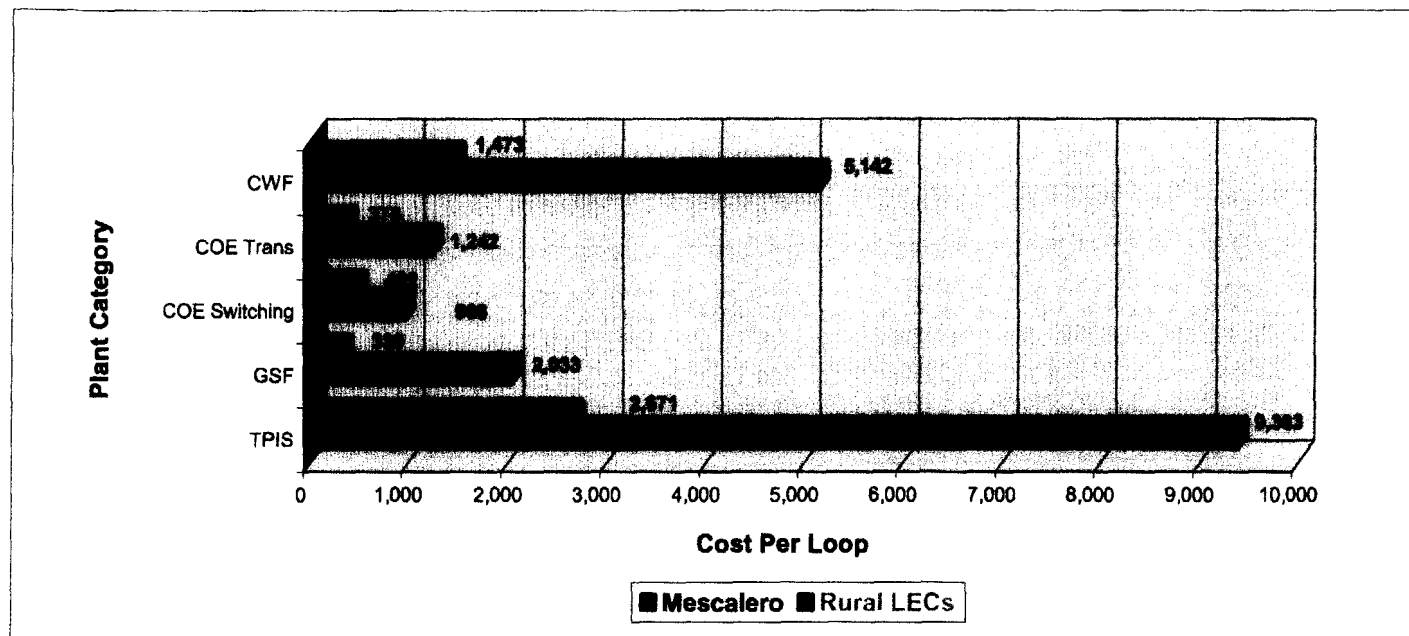
Companies w/SAR CPL > 2000

Company	State	SAR CPL
SOUTH PARK TEL. CO.	CO	15,404
BORDER TO BORDER	TX	6,356
ACCIPITER COMM.	AZ	4,314
DELL TEL. CO-OP - TX	TX	2,633
OREGON-IDAHO UTIL.	OR	2,252
SUMMIT TEL & TEL -AK	AK	2,219
DELL TEL CO-OP - NM	NM	2,068
MESCALERO APACHE TELECOM	NM	2,138

Number of Companies:

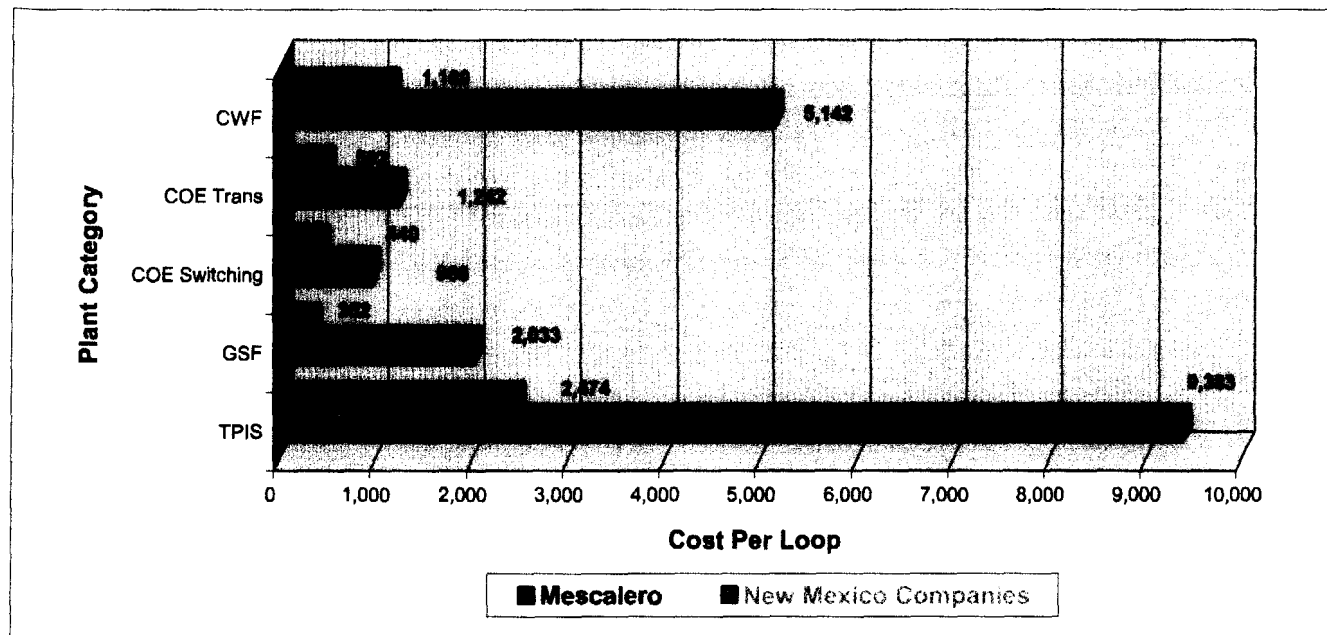
w/SAR CPL >1500 but <2000	3
w/SAR CPL >1000 but <1500	38
w/SAR CPL >500 but <1000	266
w/SAR CPL >0 but <500	554

Mescalero Apache Telecom
Cost Per Loop - Plant Comparison
Mescalero vs. Rural LECs (<100,000 A/L)



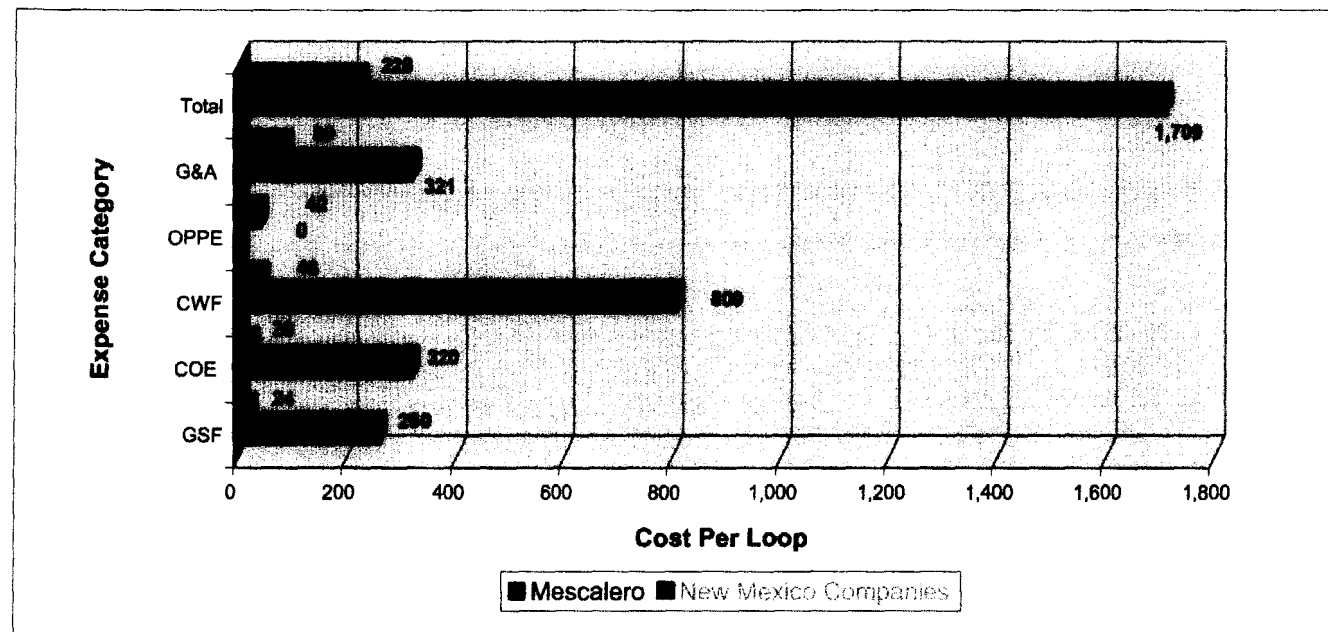
The above graph shows the investment cost per loop for major plant categories for Mescalero and Rural LECs.

Mescalero Apache Telecom
Cost Per Loop - Plant Comparison
Mescalero vs. New Mexico Companies



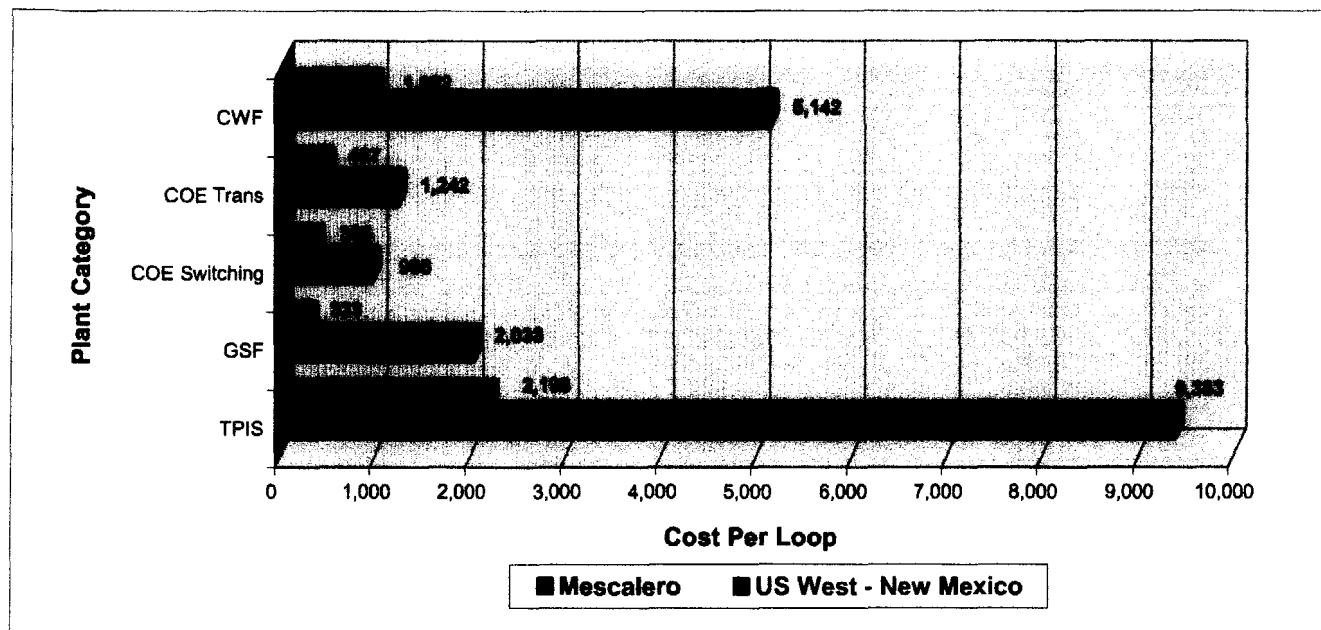
The above graph shows the investment cost per loop for major plant categories for Mescalero and New Mexico Companies.

Mescalero Apache Telecom
Cost Per Loop - Comparison of Expense Categories
Mescalero vs. New Mexico Companies



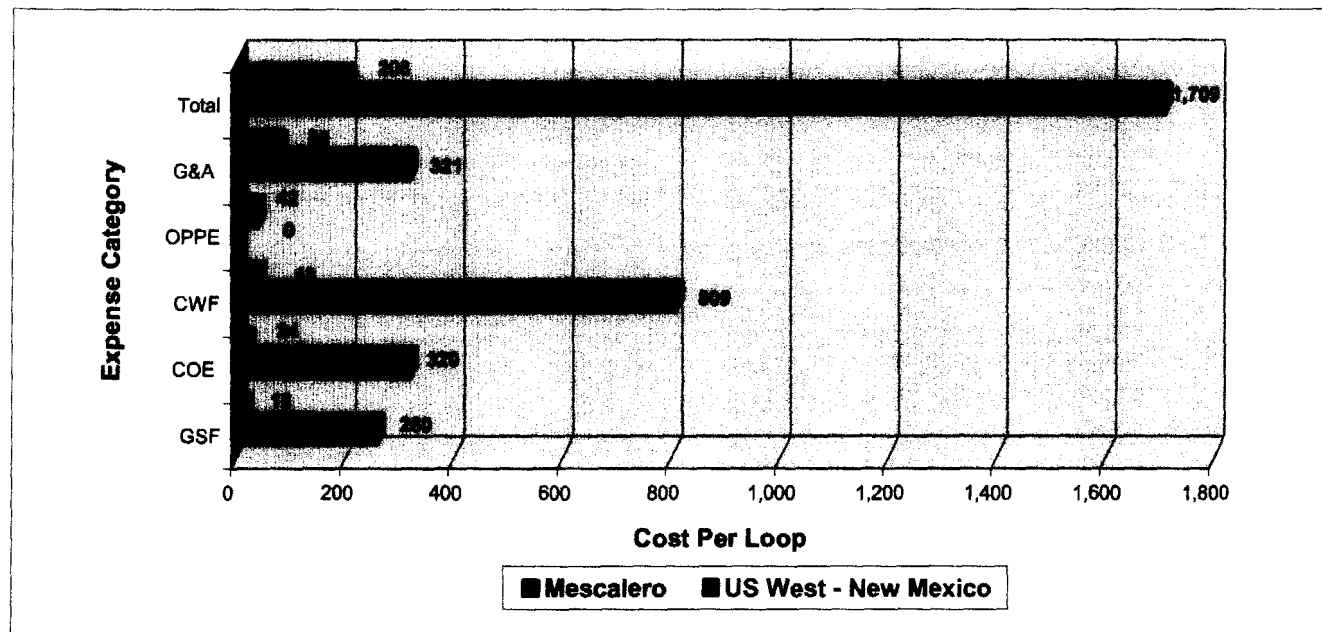
The above graph shows the cost per loop for major expense categories for Mescalero and New Mexico Companies.

Mescalero Apache Telecom
Cost Per Loop - Plant Comparison
Mescalero vs. US West - New Mexico



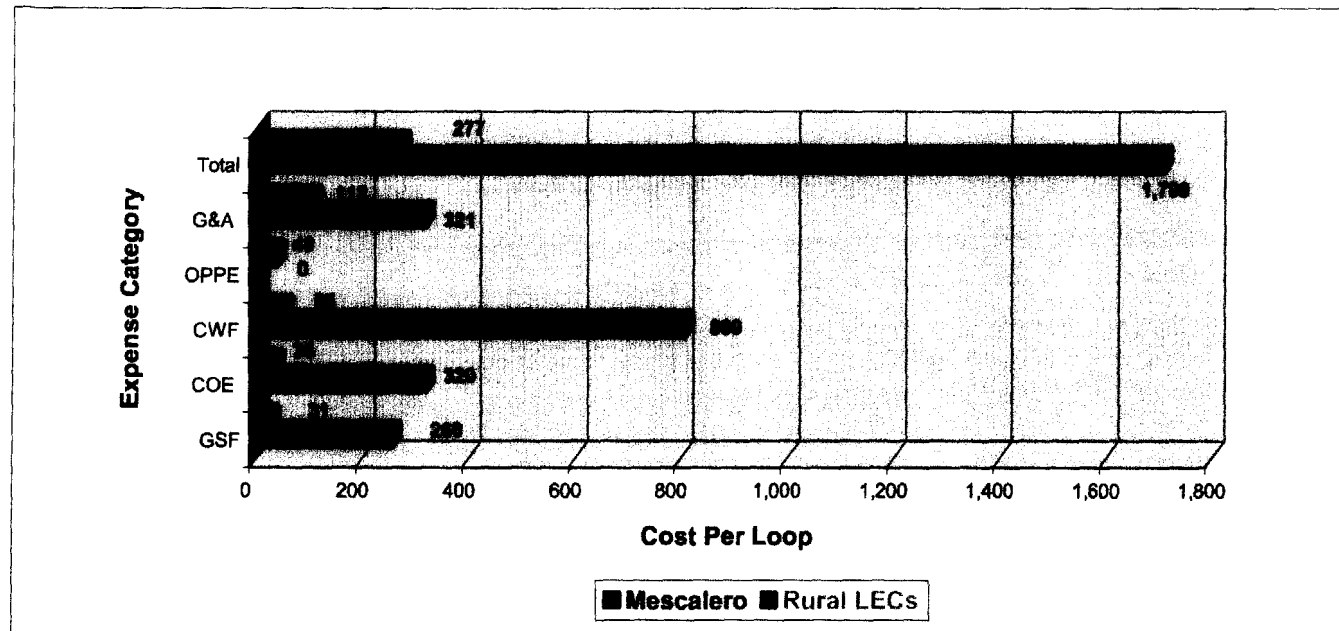
The above graph shows the investment cost per loop for major plant categories for Mescalero and US West - New Mexico.

Mescalero Apache Telecom
Cost Per Loop - Comparison of Expense Categories
Mescalero vs. US West - New Mexico



The above graph shows the cost per loop for major expense categories for Mescalero and US West - New Mexico.

Mescalero Apache Telecom
Cost Per Loop - Comparison of Expense Categories
Mescalero vs. Rural LECs (<100,000 A/L)



The above graph shows the cost per loop for major expense categories for Mescalero and Rural LECs.